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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

*[Protest of Agency Evaluation of Proposal]*

FILE: B-196246

DATE: January 28, 1981

MATTER OF: University Research Corporation

**DIGEST:**

1. Where request for proposals indicates only technical and cost factors will be evaluated for award, without an indication of relative weight, both factors are to be accorded substantially equal weight in evaluation.
2. Where offeror is aware of what it believes is erroneous solicitation number used to identify material amendment to solicitation, offeror must seek clarification and cannot assume alleged misidentification is merely inadvertent error.
3. Meaningful discussions do not require agency to point out that proposed cost is high in relation to proposed cost of lower rated albeit technically acceptable offer where higher proposed cost is below agency estimate.
4. Award of cost reimbursement contract requires informed judgment as to whether proposal costs are realistic and award of cost type contract requires more than acceptance of proposed cost as submitted merely because low offeror has history of frugality.

University Research Corporation (URC) protests the award of a cost-plus-fixed-fee contract under request for proposals (RFP) No. ROV-ACYF-79-0001 to the Contractor Corporation of America (CCA) by the Department of Health, Education and Welfare (HEW) (now the Department of Health and Human Services). The contractor is to provide specialist services to assist Head Start grantees in the utilization of Child Development Associate (CDA) training resources.

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The protester complains that the evaluation of the competing proposals did not comport with the evaluation criteria; that a material amendment was issued only to URC, with the result that URC's proposal was based on different requirements than those of the other offerors; that the agency failed to conduct meaningful negotiations with URC concerning its high proposal cost; and that the agency failed to conduct a meaningful independent cost analysis of the cost proposals. We believe there is merit to the latter basis of protest.

The RFP was issued on July 13, 1979. Five proposals were timely received and evaluated by a technical evaluation panel. The panel initially scored the offerors as follows:

	<u>Tech Score</u>	<u>Cost</u>	<u>Cost Rank</u>
(a) URC	95.0	\$339,314	4
(b) Kirschner	80.0	264,676	3
(c) CCA	67.3	195,211	1
(d) InterAmerica	58.7	215,639	2
(e) BGS University	50.67	341,701	5

All offers were ultimately considered technically acceptable and were included within the competitive range. HEW thereafter conducted telephone negotiations with each firm. After best and final offers were received from all firms, HEW evaluated and ranked them as follows:

Best and Final Offer Differential

	<u>Tech Score</u>	<u>Tech</u>	<u>(%)</u>	<u>Cost</u>	<u>Cost Rank</u>
(a) URC	97	+2	-5.5	321,434	4
(b) Kirschner	79	-1	-2.0	258,570	3
(c) CCA	71.3	+4	-0.0	195,211	1
(d) InterAmerica	59.7	+1	+4.7	224,408	2
(e) BGS University	63.67	+13	-0.5	340,140	5

HEW thereafter made a cost/price benefit analysis of each offer based on proposed costs which revealed that, as between URC, Kirchner, and CCA, CCA's offer contained only \$26,600 of indirect costs exclusive of fee whereas URC's offer, exclusive of fee, contained \$103,000 of indirect costs. The panel concluded that the proposals of URC and Kirschner were not of such technical benefit as to warrant the additional cost to the Government. Further, CCA's cost estimates were considered reasonable in light of the fact that CCA has had similar contracts in the past with no history of cost overruns.

### A. Proposal Evaluation

URC alleges that the agency erred in two respects: in considering cost and technical factors to be of equal weight, and by considering cost in initially determining technical acceptability. URC further asserts that the procurement is fatally defective because it did not set forth the relative importance of cost vis-a-vis technical factors.

The RFP stated:

#### "Evaluation Criteria

"All proposals will be evaluated in accordance with the following evaluation factors and the respective point values assigned to each are indicated. Any award which may be made will be made to that responsible offeror who can best perform the work in a manner most advantageous to the Government; cost and all of the below factors considered." (Emphasis added.)

The RFP then set out four evaluation factors and their point values: Understanding of the problem, 30 points; Soundness of approach, 30 points; Personnel, 30 points; and Facilities, 10 points.

HEW concedes that the relative importance of cost and technical factors was not specified, and advises that the issuing activity has been advised to correct that omission in future RFPs. However, HEW asserts that the failure in that regard did not render the award improper because when an RFP does not contain an explicit statement of the relative importance of cost and technical factors, they are to be accorded substantially equal weight. URC, however, argues that the absence of an indication in the RFP as to the specific relative weights of price and technical factors made the procurement fatally defective. URC quotes from our decision in 52 Comp. Gen. 161, 163 (1972):

"This failure to show the relative importance of price is contrary to the longstanding view of our Office that intelligent competition requires, as matter of sound procurement policy, that offerors be advised of the evaluation factors to be used and the relative importance of those factors.

\* \* \* We believe that each offeror has a right

to know whether the procurement is intended to achieve a minimum standard at the lowest cost or whether cost is secondary to quality. Competition is hardly served if offerors are not given any idea of the relative values of technical excellence and price. We believe a complaint is justified if in such circumstances a materially superior offer is rejected in favor of one offering a lower price. \* \* \*

We believe that HEW should have provided a more lucid statement of the basis upon which an award would be made. However, we do not agree with URC that offerors here were "not given any idea of the relative values of technical excellence and price." As HEW points out, where, as here, the RFP indicates that technical factors and cost would be evaluated and considered for award, absent any contrary indication, both factors are to be considered substantially equal in weight. 52 Comp. Gen. 686 (1973). In contrast, in the 1972 decision from which the above quotation is extracted, price was not included in the specific list of evaluation factors.

We distinguish here our recent decision H. Esmaili & Associates, Inc., B-198702, October 9, 1980, 80-2 CPD 263, in which we criticized RFP evaluation language similar to that in the instant solicitation. The protest there was against an award to the highest technically-rated offeror by a lower rated but lower-priced offeror. The basis for our criticism was that the evaluation language could have been construed to mean that an award would be made to the lowest-priced offeror submitting a technically acceptable proposal, to the possible prejudice of the protester. Here URC obviously is not arguing that the RFP was defective and prejudicial in the same manner -- CCA offered a lower price -- but rather that the RFP offered no cost/technical guidelines at all. See also A. R. & S. Enterprises, Inc., B-196518, March 12, 1980, 80-1 CPD 193.

The record also does not support URC's contention that HEW improperly considered costs in determining whether initial offers were technically acceptable. The contracting officer's negotiation memorandum indicates that at the outset the two firms rated the lowest technically were considered technically unacceptable by the technical evaluation panel. However, the contracting officer was dissatisfied with the panel's analysis and required the panel to re-evaluate the proposals with the

result that all five offerors were considered to be technically acceptable. At that point, the panel evaluated all cost proposals. Subsequently, the panel examined both cost and technical proposals of each offeror and determined that there was no substantive basis on which to exclude any of the offerors from the competitive range. We therefore do not believe there is a valid basis from which to conclude that cost was used to determine technical acceptability.

#### B. The Amendment

The crux of URC's protest in this respect is its contention that it was misled by HEW into submitting a best and final offer that proposed to do more than HEW actually required of it with the natural consequence that its proposed costs were unnecessarily high. In this regard, the record discloses that an officer of URC contacted the contracting officer on July 30, 1979, to request clarification of certain portions of the RFP. In particular, he asked the contracting officer to specify the percentage of Head Start grantees that were to receive services required by Task 1 as opposed to Task 3 of the RFP. Task I calls for the contractor to assist direct funded Head Start grantees to identify CDA training institutions within their geographic areas and to purchase CDA training from these institutions, whereas Task 3 requires the contractor to assist Head Start grantees who cannot comply with the requirements for direct funding of CDA training to provide CDA training in fiscal year 1980. The URC officer also asked the contracting officer for a list of applicable grantees.

By URC's account the contracting officer stated that 75 percent of the grantees would receive the services required under Task I and 25 percent would receive services required under Task 3. The contracting officer also indicated that he would confirm this information by an amendment to the RFP.

The confusion arose when the contracting officer issued an amendment to another solicitation, RFP No. ROV-ACYF-79-0003, under which URC also submitted a proposal. Apparently, the contracting officer understood the telephone conversation between the URC official and himself to concern RFP-0003 rather than RFP-0001 which is the subject of this protest. The amendment clearly cited RFP ROV-ACYF-0003, stated that approximately 75 percent of the grantees were direct funded, and provided a list of 200 grantees. The amendment, according to URC,

incorrectly referenced RFP -0003. HEW, on the other hand, contends that the amendment referenced the correct solicitation number and presents considerable evidence to demonstrate the relationship between the amendment and RFP -0003.

Based on this information, URC framed its proposal to service 150 direct funded grantees and 50 non-direct funded grantees because of its belief that the amendment applied to RFP-0001. On the other hand, CCA submitted proposals to service approximately 50 direct funded grantees and 15 non-direct funded grantees. However, all offerors submitted proposals to provide 450 days of technical assistance under Task 1 and 150 days of technical assistance under Task 3 or a total of 600 consultant days.

URC maintains that because of the misunderstanding it offered to provide much higher caliber and more expensive personnel than it would have otherwise. URC explains that the work requirement to service 200 grantees with 600 days of technical assistance rather than 65 grantees required using technical personnel possessing superior skills and efficiency.

It is our belief that at least initially, URC had grounds to believe that the questioned amendment referred to the protested solicitation, given the fact that the amendment was issued the day following the telephone conversation and that the contracting officer has in the past combined amendments for the ROV-ACYF-79 series of solicitations. However, we believe that URC should have been aware that the Amendment identified RFP -0003 and should have sought to clarify the situation promptly by questioning the contracting officer. Instead of pursuing this course of action, URC simply assumed that the contracting officer had inadvertently mislabeled the amendment. It was only after HEW awarded CCA the contract that URC first raised this issue concerning the amendment. Given that the amendment was not erroneous insofar as the contracting officer was concerned, we believe the responsibility for URC's mistaken belief must ultimately rest with the firm, not the Government because of its failure to seek any clarification of what it believed was an error. Cf., Avantek, Inc., 55 Comp. Gen. 735 (1976), 76-1 CPD 75. We, therefore, find no merit to URC's contention in this respect.

#### C. Meaningful Discussions

In Federal negotiated procurements, discussions with offerors must be meaningful once they are commenced. However,

the concept of "meaningful" discussions is an amorphous one. For example, while the term "negotiation" (which we have equated with discussions) generally implies a series of offers and counter-offers until a mutually satisfactory agreement is concluded by the parties, 47 Comp. Gen. 29 (1967), such a procedure is not essential for compliance with Federal procurement statutes. See 51 Comp. Gen. 479 (1972). Nevertheless, as a general matter, once discussions are commenced, the agency is required to point out deficiencies or excesses in the offeror's proposal, see Checchi and Company, 56 Comp. Gen. 473 (1977), 77-1 CPD 232, although the extent and content of written and oral discussions is a matter of procuring agency judgment. Checchi and Company, supra.

We believe the discussions held with URC can be considered meaningful. URC's cost proposal of \$321,434 was not the highest one received, and in fact was \$20,000 less than the Government's estimate for the requirement. In such circumstance, we do not agree that the contracting officer was obliged to advise URC that its cost proposal was too high simply because it substantially exceeded the cost proposal of a lower-rated albeit technically acceptable offer which was in the competitive range, because there were no excesses apparent for that which URC offered at the time negotiations were conducted which would warrant specific discussion.

The protest on this issue is denied.

#### D. Cost Analysis

URC also complains that HEW failed to conduct a proper cost analysis of CCA's proposal as required by FPR § 1-3.807. Specifically, URC maintains that HEW did not adequately analyze the disparity between CCA's proposed costs and the Government estimate. URC also maintains that HEW improperly failed to consider evaluated rather than proposed costs. We believe there is merit to these assertions.

FPR § 1-3.807.2(a) provides that generally some form of price or cost analysis should be made in connection with every negotiated procurement action. The method and degree of analysis, however, is dependent on the facts surrounding the particular procurement and pricing situation. The regulation also states that "the extent of the cost analysis should be that necessary to assure reasonableness of the pricing result, taking into consideration the amount of the proposed contract and the cost and time needed to accumulate the necessary data for analysis."

Our Office has recognized that a low cost estimate proposed by an offeror should not be accepted at face value and that an agency should make an independent cost projection of the estimated costs reflected in the cost proposal. PRC Computer Center, Inc., et al., 55 Comp. Gen. 60 (1975), 75-2 CPD 35. This is to ensure that costs are examined in terms of their realism since the Government will be obligated under a cost-reimbursement type contract to reimburse the contractor its allowable costs. Moshman Associates, Inc., B-192008, January 16, 1979, 79-1 CPD 23. We have also noted that conducting a cost realism evaluation is a function of the contracting agency whose determinations will not be disturbed by our Office unless they clearly lack a reasonable basis. Moshman Associates, Inc., supra.

Thus, the award of a cost-reimbursement contract requires the exercise of informed judgments as to whether proposed costs are realistic; award of a contract on the basis that the costs proposed are reasonable per se because they are low on a comparative basis is improper without an appropriate analysis that adequately measures the realism of such low costs. Where the award of a contract is based ultimately on the estimated cost for performance of the contract, a determination of cost realism requires more than the acceptance of proposed costs as submitted. Joule Technical Corporation, B-192125, May 21, 1979, 79-1 CPD 364.

The contracting officer's "analysis" here consisted for the most part of his conclusion that no overruns would be incurred because CCA had similar contracts in the past "with no history of cost overruns." We also point out that while the technical evaluation panel's chairperson was willing to accept CCA's "prior history of frugality" as the basis for his judgment that CCA's offer was the "better buy," he also believed CCA's proposed costs to be "dangerously low" (URC's proposal was characterized as "unnecessarily high") and expressed continuing "concerns about CCA's ability to complete this contract at the price quoted." We believe that in view of the agency's estimate for this effort (\$341,900), URC's proposed costs (\$321,434), CCA's proposed cost (\$195,211), the stated concerns of the technical evaluation panel chairperson and our observations, the reliance on CCA's "past history of frugality" may well have been found to be misplaced if an appropriately detailed cost realism analysis had been performed. We therefore sustain the protest on this issue.



We do not know if CCA's proposed costs would have been found deficient if a meaningful cost realism analysis had been performed, and therefore we have no basis to conclude from our analysis of the record either that CCA's costs were not realistic or that URC was entitled to the award of the contract in this instance. We do note, however, that according to the Department, the contract was satisfactorily performed by CCA at a cost of \$146,534. While this factor is not a justification for a deficient cost realism analysis prior to award, it does suggest that the costs likely would have been found to be realistic if a proper analysis had been performed. Nonetheless, to avoid a recurrence of this situation, we are bringing the deficiency to the attention of the Secretary of the Department by separate letter.

E. Cost of Protest.

URC also requested the legal expenses it incurred in this protest because a decision was not rendered in time for meaningful relief. In this connection we point out that the costs of pursuing a bid protest are not compensable. Bell and Howell Company, 54 Comp. Gen. 937 (1975), 75-1 CPD 273.

The protest is denied in part and sustained in part.

*Milton J. Aorolan*

For the Comptroller General  
of the United States